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OPINION OF THE BOARD OF CONTRACT APPEALS

February 1, 2005

Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge VERGILIO.

On March 19, 2004, American Bank Note Company of Trevese, Pennsylvania (contractor or ABN), filed this appeal with the Board, involving the U. S. Department of Agriculture, Food and Nutrition Service (FNS or Government). Under a five-year requirements contract, No. 53-3198-9-003, the contractor provided storage, distribution, and ordering services of FNS food coupons used in the food stamp program, with the distribution to specified state shipping points. In the eleventh month of contract year 5 (August 2003), after the Government had exceeded the maximum number of boxes for distribution in the contract line item (both in the original contract and in a subsequent bilateral modification, but not in a proposed bilateral modification unsigned by the contractor), the Government issued unilateral change orders directing that the remaining boxes be distributed to California (a state shipping point as contemplated in the contract) or to other than a state shipping point (either a location for storage or a different location for destruction). The total of these

remaining boxes also exceeded the maximum identified in the unsigned modification. The contractor so disposed of these remaining boxes it had received into storage during the contract.

Through a properly certified claim, the contractor sought payment of \$1,534,287.85. This is calculated at the unit price found in the contract for the distribution of the boxes (\$1,540,550.40) less savings said to be realized by the work eliminated in the change order (\$6,262.55). The contracting officer agreed to payment at the unit price for the boxes distributed to California, but denied payment at the unit price for those boxes delivered elsewhere, finding that the contractor was entitled only to reasonable costs incurred for the actual work performed and profit. Although the contracting officer granted the claim, in part, finding the contractor entitled to recover \$203,486.67, payment did not immediately ensue. The contractor filed this appeal before it had received payment.

The Board has jurisdiction over this timely-filed appeal pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, as amended (CDA). The parties have opted to submit the matter for decision based upon the written record, without a hearing on the merits. Each party submitted a brief, after the appeal file was supplemented and the evidentiary record closed.

The contractor's theory of relief is that its distribution and shipment of all boxes occurred pursuant to the contract at the distribution line item price, and that the Government bears the burden of proof to reduce this price pursuant to the contract modifications, which the contractor identifies as deductive change orders. In contrast, the Government contends that the modifications constitute additive change orders, placing within the contract services not included within the requirements identified in the contract. Specifically, the Government maintains that the delivery of the boxes to locations other than California were outside of the identified requirements in terms of location (not state shipping points) and of amounts (exceeding the dollar limitation of the distribution line item). Because the contract does not price such items, the Government contends that the burden of proof is on the contractor to demonstrate its reasonable costs incurred to perform the additional work.

The Board concludes that the services at issue fall outside of the requirements identified in the contract; the modifications and related efforts do not constitute deductive changes, but additional work. The line item price in the contract is applicable to specified requirements only up to the contract maximum (as actually modified). The contractor did not enter into a modification that would have made the line item price applicable to those boxes distributed to California. Moreover, the shipment of boxes to locations other than state shipping points falls outside of the identified requirements of the contract and represents additional work reasonably within the scope of the contract but outside of the pricing structure. The contractor bears the burden of proof to recover for these additive changes.

Although the contractor may have incurred costs to perform the work under the change orders, by which the Government benefitted, the contractor has presented neither evidence nor argument of what its costs were, as it simply claims entitlement to the unit price in the contract less its purported savings. Based upon the evidence in the record, the unit price in the contract is not a reasonable reflection of the contractor's incurred costs, as the unit price substantially overstates any additional expenses incurred; the unit price in the contract reflects various amortized and allocated costs that

would have been fully recovered when the Government ordered the distribution of the maximum number of boxes in the original contract. Without supporting evidence in the record, the contractor has not carried its burden of proof to recover. Accordingly, the Board denies the appeal.

FINDINGS OF FACT

The Contract

1. With an effective date of October 1, 1998, the Government awarded to the contractor a contract for the secure storage and distribution of boxes of food coupon books used in the food stamp program (Exhibit A at 1, 7) (all exhibits are in the appeal file, as supplemented). The introduction to the statement of work describes the work to be performed, with this contractor the referenced "distribution contractor":

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), has the mission of eliminating hunger and malnutrition in the United States. One of the methods used to accomplish this mission is the operation of the Food Stamp Program in conjunction with the States. . . . Books of food coupons are produced under contract between private companies and FNS. Boxes of food coupon books are delivered to a distribution contractor for secure storage and preparation for shipment to the States. The Statement of Work (SOW) provides for the following: (a) secure storage at a distribution center for the boxes of food coupon books; (b) inventory accountability; (c) data processing support for the preparation of boxes of food coupons for shipment to about 1,000 different State shipping points; (d) labeling, loading, accountability for, and tracking of shipments to the States; (e) contracting for the armored carrier transportation of the boxes of food coupon books to the States; and (f) making arrangements with the U.S. Postal Service for shipments of boxes of food coupon books to the States by registered mail.

(Exhibit A at 7 (¶ C-1).) The effective period of the contract is from October 1, 1998, through September 30, 2003 (Exhibit A at 47 (¶ F-2)). In an amendment to the solicitation, the Government states that it expects that its requirements will not continue beyond this contract: "FNS anticipates that this will be the last contract for the storage and distribution of food stamp coupons. USDA is phasing out paper coupons and expects to have fully implemented an electronic benefits transfer system in the Year 2003." (Exhibit JJ at 675 (¶ 10).) As detailed below, Finding of Fact (FF) 10, the contract also contains a cancellation clause, should the Government cancel its requirements.

2. The contract identifies itself as both a requirements contract and an indefinite-quantity contract at fixed unit prices on an indefinite quantity basis for an overall period of five years. In pertinent part, the Requirements (OCT 1995) clause, 48 CFR 52.216-21, of the contract states:

(b) Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause. Subject to any limitations in the Order Limitations clause or elsewhere in this contract, the Contractor shall furnish to the

Government all supplies or services specified in the Schedule and called for by orders issued in accordance with the Ordering clause. The Government may issue orders requiring delivery to multiple destinations or performance at multiple locations.

(Exhibit A at 72-73.)

3. In pertinent part, the Indefinite Quantity (OCT 1995) clause, 48 CFR 52.216-22, of the contract states:

(b) Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause. The Contractor shall furnish to the Government, when and if ordered, the supplies or services specified in the Schedule up to and including the quantity designated in the Schedule as the maximum. The Government shall order at least the quantity of supplies or services designated in the Schedule as the minimum.

(c) Except for any limitations on quantities in the Order Limitations clause or in the Schedule, there is no limit on the number of orders that may be issued. The Government may issue orders requiring delivery to multiple destinations or performance at multiple locations.

(Exhibit A at 73 (emphasis added).)

4. As referenced in the two above-quoted clauses, the contract contains an Ordering (OCT 1995) clause, 48 CFR 52.216-18:

(a) Any supplies and services to be furnished under this contract shall be ordered by issuance of delivery orders or task orders by the individuals or activities designated in the Schedule. Such orders may be issued from October 1, 1998 through September 30, 2003.

(b) All delivery orders or task orders are subject to the terms and conditions of this contract. In the event of conflict between a delivery order or task order and this contract, the contract shall control.

(Exhibit A at 71 (¶ I-5).) The Order Limitations (OCT 1995) clause, 48 CFR 52.216-19, discusses minimum and maximum orders. It specifies that "the Contractor shall honor any order exceeding the maximum order limitations in paragraph (b), unless that order (or orders) is returned to the ordering office within 5 days after issuance, with written notice stating the Contractor's intent not to ship the item (or items) called for and the reasons." (Exhibit A at 71-72.)

5. Under the heading "procedures for shipment preparation," the contract specifies that boxes may not be shipped absent an order from the Government: "No boxes of food coupon books may be shipped unless a paper or electronic order has been received by the Contractor." Also, "Orders for

shipment of boxes of food coupon books are made electronically and in controlled batches. Every shipment of boxes of food coupon books requires that an Advice of Shipment, Form FNS-61, be sent to designated receivers by the Contractor.” (Exhibit A at 25 (¶ C-1.IV.B, B.1).)

6. As awarded, the contract covers five years, with three separately priced line items for each year: secure storage (priced on a monthly basis), distribution of food coupon boxes (with a unit price per box and a stated maximum quantity of boxes), and automated ordering (priced on a monthly basis). For example, for contract year 1, the contract contains the following:

<u>Item</u>	<u>Supplies/Services</u>	<u>Quantity</u>	<u>Unit</u>	<u>Unit Price</u>	<u>Amount</u>
1	Secure Storage	12	MO	\$41,071.00	\$492,852.00
1A	Distribution of Food Coupon Boxes	211,000	BX	\$ 2.54	\$535,940.00
1B	Automated Ordering	12	MO	\$ 3,499.06	\$ 41,988.72

(Exhibit A at 5-6 (¶ B-1).)¹ The sum of the three line item amounts is \$1,070,780.72. The awarded line items are based upon the best and final alternate proposal submitted by the contractor (Exhibit II at 667-68). For contract year 5, the distribution line item states the maximum quantity of 21,000 boxes, a unit price of \$20.60, and a total amount of the services, \$432,600 (Exhibit A at 6 (¶ B.1)).

7. Line items 1 and 1A of the awarded contract differ from those found in the solicitation and the contractor's basic (not alternate) proposal. Line item 1 identified in the solicitation and the basic proposal for each year is for the “secure storage and distribution of food coupon boxes,” to be paid on a unit (box) price basis, with a maximum quantity identified for each year. (Exhibit II at 664-65.) As can be seen with the above description, in the alternate proposal accepted by the Government, that first line item is separated into two components, one for the secure storage of boxes, priced on a monthly basis, and the other for the distribution of food coupon boxes, priced on a unit (box) price

¹ The contract award standard form lists these three items as line items 2A, 2B, and 2C, with the identical units and pricing, while line item 1 is for the secure storage, distribution of food coupon boxes and automated ordering identified as a “job” under the heading of unit (Exhibit A at 1).

basis, with the alternate proposal utilizing the quantity in the solicitation for each year. The contractor submitted its alternate proposal with this distinction in pricing--“storage” priced on a monthly basis, and “distribution” based on a per box basis (Exhibits GG at 647, HH at 667-68). In response to Government questions regarding the initial alternate proposal (with monthly storage prices and per box distribution prices), the contractor states, prior to best and final offers: “The alternate bid was submitted to provide for the changing nature of the Food Coupon program. Under the alternative proposal, billings would be based on both the storage and shipping requirements.” Further, it specifies that “if the number of shipments should decrease resulting in decreased manpower requirements, this would result in lower billing to the USDA under the alternate bid proposal. Therefore, the alternate bid provides for the changing nature of the two equally important features of the program - storage and distribution.” (Exhibit GG at 618 (¶ 1).) The contractor later provided the following commentary with its revised proposals: “ABN considers the Alternate bid as more reflective of two distinct parts of the contract; that is, Distribution and Storage.” (Exhibit HH at 639.) The alternate proposal does not indicate that the Government will incur a distribution charge for every box that enters into storage. There is no indication in the record that the Government adopted the alternate proposal with the understanding that it would be liable to compensate the contractor at a distribution line item price when the Government did not order the distribution or shipment of a box in storage.

8. The Provisions for Pricing and Payment clause in the contract, as initially awarded, states:

The total fixed price for this contract is \$1,070,780.72. Payment shall be made in accordance with Section B-1, Schedule of Items, at the unit prices specified, not to exceed the total amount for any item.

(Exhibit A at 6 (¶ B-2) (emphasis added).) The stated fixed price is the sum of the three line items for year one (FF 6).

9. Consistent with the provision that payment shall not exceed the total amount for any item, the contract contains, as a special contract requirement, a Non-Payment for Additional Work clause:

Any additional supplies or services, or a change to work specified herein, which may be performed by the Contractor, either at their volition or at the request of an individual other than the Contracting Officer, except as authorized in this contract, are not authorized and shall not be reimbursable. Only the Contracting Officer is authorized to change the specifications and terms and conditions of this contract.

(Exhibit A at 62 (¶ H-6).)

10. The contract contains a cancellation clause:

I-9 Cancellation Under Multi-year Contracts (FAR 52.217-2) (OCT 1997):

(a) Cancellation, as used in this clause, means that the Government is canceling its requirements for all supplies or services in program years subsequent to that in which notice of cancellation is provided. Cancellation shall occur by the date or within the time period specified in the Schedule, unless a later date is agreed to, if the Contracting Officer --

(b) Except for cancellation under this clause or termination under the Default clause, any reduction by the Contracting Officer in the requirements of this contract shall be considered a termination under the Termination for Convenience of the Government clause.

(Exhibit A at 74-76.) The contract incorporates the Termination for Convenience of the Government (Services) (Short Form) (APR 1984) clause, 48 CFR 52.249-4 (Exhibit A at 69).

11. In the Cancellation Fee clause, the contract establishes maximum amounts that would be paid to the contractor in the event of a cancellation of services for years 2 through 5: "The cancellation fee negotiated for this contract shall not exceed the following amounts: . . . Year 5 \$208,230.00[.]" The fee amount diminishes from year to year. (Exhibit A at 6 (¶ B-3).) While the cancellation fee is a maximum, the cancellation clause identified in the above-finding dictates the costs that may be recovered (generally, costs amortized over the contract period and allocable portions of costs, which otherwise are not fully recovered because of the cancellation, as well as a profit on such costs).

12. The contract does not explicitly address the disposal of any boxes remaining in storage at the end of the contract, either after the full contract period, or contract period shortened by default, convenience termination, cancellation, or lack of requirements. However, as noted above, in recognition of the changing (i.e., phasing out of) requirements, the contractor specified in its submissions that should the number of shipments decrease, this would result in lower billing under the alternate proposal (FF 7).

13. The contract incorporates the Payments (APR 1984) clause, 48 CFR 52.232-1. The clause specifies: "The Government shall pay the Contractor, upon the submission of proper invoices or vouchers, the prices stipulated in this contract for supplies delivered and accepted or services rendered and accepted, less any deductions provided in this contract." (Exhibit A at 68.)

14. The contract incorporates the Changes -- Fixed-Price (Alternate 1) (AUG 1987) clause, 48 CFR 52.243-1:

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

. . . .

(2) Method of shipment and packing.

(3) Place of delivery.

(b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.

(Exhibit A at 68.) The contract also incorporates the Termination for Convenience of the Government (Services) (Short Form) (APR 1984) clause (48 CFR 52.249-4) (Exhibit A at 69.)

Performance

Contract year 4

15. Given the limited evidence (in the evidentiary record) and discussion (in the administrative record) regarding performance during the initial three years of the contract, material facts regarding performance largely begin with contract year 4, covering October 2001 through September 2002.² At the start of contract year 4, the contractor had in storage 25,893 or 25,373 boxes (the uncertainty arises because the figures submitted by the contractor for the boxes in storage for October and November 2001 (the start of contract year 4), are not consistent with the identified shipments and receipts (Exhibit KK at 2)). The contract identifies for the distribution line item for contract years 4 and 5 a maximum of 41,000 boxes and 21,000 boxes, respectively (Exhibit A at 6). Thus, absent a contract modification, the maximum number of boxes that could be distributed under the contract during the final two years was 62,000.

16. By the end of November 2001, the contractor had 59,455 boxes in storage, and had distributed 14,433 boxes during the contract year. The contractor had more boxes in storage than

² Contract modification 1, with an effective date of October 1, 1998, adds the Price Redetermination--Retroactive (Oct 1997) clause, 48 CFR 52.216-6, "as agreed during negotiations." The modification does not indicate the figures to be inserted into the blanks of the clause for a ceiling price. (Exhibit B at 86-87). The existing record does not demonstrate that either party complied with the provisions prescribing use of the clause, particularly the admonition that the clause shall not be used except for research and development contracts with an estimated value of \$100,000 or less, and the requirement for quarterly submissions by the contractor of its reasonably incurred and allocable costs. 48 CFR 52.216-6. The modification seems to erroneously identify this clause. During negotiations the Government indicated, with the support of the contractor, that it would add the Value Engineering clause, 48 CFR 52.248-1 (Exhibits GG at 625 (¶ 14), HH at 638). Neither party makes reference to either clause with regard to this claim. The Board concludes that neither clause provides a basis for relief to this contractor. The contract modification is an example of each party paying little particular attention to the explicit terms and conditions of the contract.

could be shipped under the distribution line items in the existing contract through its completion.
(Exhibit KK at 2.)³

³ That is, it had already distributed 14,433 boxes of the 62,000 total maximum number of boxes which it could distribute. The difference, 47,567 boxes, which represents the boxes that could be distributed, is less than the 59,455 boxes in storage.

17. With a signature date of December 6, 2001, but with an effective date of October 1, 2001, the Government issued a unilateral contract modification to reflect that funding had become available.⁴ With that modification, for contract year 4, the line items in Section B-1 state:

4	Secure Storage	12	MO	\$25,500.00	\$306,000.00
4A	Distribution of 41,000 BX Food Coupon Boxes		\$	11.47	\$470,270.00
4B	Automated Ordering	12	MO	\$ 4,167.43	\$ 50,009.16

(Exhibit K at 111 (¶ 1).) The modification also alters section B-2, the Provisions for Pricing and Payment clause, to incorporate the new totals, so as to read:

The total fixed price for this contract is **\$3,840,920.56**. Payment shall be made in accordance with Section B-1, Schedule of Items, at the unit prices specified, not to exceed the total amount for any item.

(Exhibit K at 111 (¶ 2).) The total reflects obligations for the three earlier contract years and the totals in contract year 4 (Exhibit K at 111-12 (¶ 3)).

18. By the end of February 2002, the contractor had 34,187 more boxes in storage than it could distribute under the existing distribution line items of the contract (Exhibit KK at 2).

19. With an effective date of March 19, 2002, the parties entered into bilateral contract modification 12. "The purpose of this modification is to obligate \$493,210.00 to add 43,000 boxes of food coupons under section B-1, line item 4A, distribution of food coupon boxes in year 4. The

⁴ Earlier, with an effective date of October 1, 2001, the Government had issued a unilateral contract modification stating that its purpose is to obligate funds for contract year 4, but with the caveat "subject to the availability of Fiscal Year" funds. (Exhibit J (modification 9).)

per box price negotiated prior to award is \$11.47.” (Exhibit M at 116.)⁵ The amount obligated corresponds to the product of the added boxes (43,000) and the unit price (\$11.47). Accordingly, section B-1, as modified, reads:

4	Secure Storage	12	MO	\$25,500.00	\$306,000.00
4A	Distribution of 84,000 BX Food Coupon Boxes		\$ 11.47	\$963,480.00	
4B	Automated Ordering	12	MO	\$ 4,167.43	\$ 50,009.16

(Exhibit M at 117 (¶ 1)). Given the adjustments in the prior contract modification to reflect final figures for the distribution line item for contract year 3 and the total contract price (with an error of \$.06 (Exhibit L at 115)), this modification also alters section B-2, the Provisions for Pricing and Payment clause, to incorporate the new totals, so as to read:

The total fixed price for this contract is **\$4,331,075.30**. Payment shall be made in accordance with Section B-1, Schedule of Items, at the unit prices specified, not to exceed the total amount for any item.

(Exhibit M at 117 (¶ 2).) The modified contract provides for the distribution of a maximum of 84,000 boxes in contract year 4 and 21,000 boxes in contract year 5. This is the distribution of a

⁵ The record does not demonstrate that the parties negotiated a per box distribution price for boxes in excess of the stated yearly maximum for any year of performance. Rather, the record indicates that the negotiated price was for the distribution of boxes within the contract limitations. Further, the record demonstrates that the additional distributions were significantly less costly because amortized fixed and variable costs for a given year already would have been fully recovered with the distribution of the maximum number of boxes.

maximum total of 105,000 boxes during contract years 4 and 5. By the end of March 2002, the contractor had in storage 55,860 boxes and had shipped 46,324 boxes during the contract year, for a total of 102,184. The parties could have utilized the existing contract, without further modification, to distribute the boxes then in storage over the remaining life of the contract.

20. However, given shipments and receipts, for all ensuing months of contract year 4 (April through September 2002), the contractor had in storage more boxes than it could distribute under the distribution line items of the existing contract. During contract year 4, the contractor had cumulatively distributed 77,236 boxes. (Exhibits O at 137, KK at 2-3.) This figure falls within the 84,000 maximum for the distribution line item of the amended contract (FF 19) and exceeds the 41,000 boxes in the awarded contract (FF 15). By the end of contract year 4, the contractor had distributed a total of 446,169 boxes during the first four years of the contract, compared to the total of 429,000 boxes, calculated using the maximums in the distribution line items for those years of the contract, as awarded (Exhibits A at 5-6, E at 93, H at 100, L at 114, O at 137).

Contract year 5

21. Contract year 5 began with 111,533 boxes in storage. During contract year 5, the contractor received into storage only one additional box (during March 2003). (Exhibit KK at 2-4.) At the start of contract year 5, the distribution line item specifies 21,000 boxes as the maximum for distribution, at the per box price of \$20.60 (Exhibit A at 6).

22. With an effective date of October 1, 2002 (the start of contract year 5), the parties entered into bilateral contract modification 13, with a stated purpose to secure the storage and distribution of food coupon books for contract year 5. The modification states:

The contractor shall provide all services and materials to accomplish the work set forth in the attached revision to the Statement of Work during the period 01 October 2002 through 30 September 2003. The work shall be performed in accordance with the Contractor's proposal dated 13 September 2002. In case of any conflict between the SOW revision and the Contractor's proposal, the proposal shall prevail.

All other contract terms and conditions remain unchanged and in full force and effect.

(Exhibit N at 119, emphasis added.) The tasks required under the revised statement of work and proposal are not here at issue. The distribution line item figure of 21,000 boxes and the unit price of \$20.60 do not change under the bilateral modification.

23. On January 2, 2003, the contractor signed bilateral contract modification 14, with an effective date of October 1, 2002 (contract year 5). The modification obligates \$797,609.76 of fiscal year 2003 funds for contract year 5. This amount is the sum of the three line items at the accepted contract prices for contract year 5 (Exhibit A at 6). The modification identifies 21,000 boxes for distribution at a unit price of \$20.60, for a total line item amount of \$432,600. Further, the modification states, under a revised section B-2: "Payment shall be made in accordance with Section

B-1, Schedule of Items, at the unit prices specified, not to exceed the total amount for any item." This modification specifies, "Except as provided herein all terms and conditions of [this contract] remain in full force and effect." (Exhibit O at 136-38). At the start of January 2003, the contractor had in storage 98,707 boxes (Exhibit KK at 4).

24. By the end of February 2003 the contractor had cumulatively distributed 24,036 boxes during contract year 5; by the end of March 2003 this figure was 30,900 boxes. These figures exceed the distribution line item maximum of 21,000 boxes. (Exhibit KK at 4; FF 23.)

25. On April 22, 2003, the contractor signed bilateral contract modification 15, with an effective date of April 24, 2003. The modification obligates an additional \$309,000, allocated to the distribution line item. The modification increases by 15,000 boxes the maximum number of boxes identified in the distribution line item at the stated unit price; it does not alter other line item pricing:

5	Secure Storage	12	MO	\$26,000.00	\$312,000.00
5A	Distribution of 36,000 BX Food Coupon Boxes		\$ 20.60	\$741,600.00	
5B	Automated Ordering	12	MO	\$ 4,417.48	\$ 53,009.76

(Exhibit P at 139-40.) Further, the modification states, under a revised section B-2: "Payment shall be made in accordance with Section B-1, Schedule of Items, at the unit prices specified, not to exceed the total amount for any item." The modification further specifies: "Except as provided herein all terms and conditions of [this contract] remain in full force and effect." (Exhibit P at 141). At the end of April 2003, the contractor had in storage 78,410 boxes. By the end of April, the contractor had cumulatively distributed 33,124 boxes during the contract year. (Exhibit KK at 4.)

26. By the end of June 2003, the contractor had cumulatively distributed 35,987 boxes during the contract year; it had in storage 75,547 boxes. By the end of July 2003, the contractor had cumulatively distributed 36,750 boxes during the contract year; it had in storage 74,784 boxes. (Exhibit KK at 4). The distribution line item, as modified, provides for the distribution of a maximum of 36,000 boxes during contract year 5 (FF 25).

August and September

27. The Government issued what is identified as contract modification 16, requiring the signature of the contractor, with a stated effective date of August 13, 2003, with the following description:

The purpose of this modification is to acquire the distribution of 15,900 additional Food Coupon Boxes. The unit price is established at \$20.60. The quantity purchased is increased from 36,000 boxes by 15,900 to 51,900 boxes. This action increases the dollars obligated from \$5,378,404.37 by \$327,540.00 to \$5,705,944.37.

(Exhibit Q at 142.) The proposed modification would retain the pricing for the storage and automated ordering line items, while increasing the number of boxes in the distribution line item at the \$20.60 unit price in the contract. Further, in a revised section B-2, which identifies the increased total fixed price for the contract, the proposed modification states that payment shall be made at the unit prices specified, not to exceed the total amount for any item. (Exhibit Q at 143.) This modification specifies, "Except as provided herein all terms and conditions of [this contract] remain in full force and effect." (Exhibit Q at 144). The contractor did not sign the proposed modification, which was to be a bilateral modification requiring the signature of the contractor. The modification remains unsigned; that is, there is no signed modification in the record. (Exhibit Q at 142.)⁶

28. The Government unilaterally issued contract modification 17, with an effective date of August 17, 2003. The modification specifies:

⁶ In an affidavit, the Chief Operating Officer of the contractor does not offer an explanation as to why the modification remained unsigned. Rather, he states that the contractor performed the work required under the modification and that he "considered it a ratified contract action." (Exhibit BB at 7 (¶ 16).) The statement does not attempt to reconcile the position of the contractor, put forward in a letter, dated October 6, 2003, to the Government by the contractor's then-attorney: the contractor "was informed that FNS would not make these payments [on the August invoices] until ABN executed Modification Nos. 016, 017 and 018 of the contract. We are unaware of any term in [the contract] that requires execution of modifications issued by FNS as a precondition for payment under the contract." (Exhibit X at 161.)

In accordance with and by the authority of FAR Clause 52.243-1 Changes -- Fixed Price, the Government is making the following unilateral changes to the contract.

The Government has projected that there will be 73,818 boxes of food coupons left in the contractor's facility as of the close of business August 22, 2003. Those boxes will be distributed as follows:

8,623 boxes to California, IAW [in accordance with] the contract
4,515 boxes to Bureau of Printing and Engraving, date to be determined
60,680 boxes to destruction (shredding), three (3) truckloads per day from August 25th through August 29th, and the remainder the week of September 22nd through September 26th until the boxes are depleted.

The 8,623 boxes going to California will be handled in accordance with the terms and conditions of the contract and **are not** included in this modification. As for the 4,515 boxes going to the Bureau of Printing and Engraving, and the 60,680 boxes going to destruction, the contractor is responsible for the following:

All coupons are to be account[ed] for as usual in the computer;
A GBL will be prepared for each truck (shipment) and given to the armored carrier;
Loading full skids of coupon boxes onto the armored carriers; and,
Award the contract to armored carriers, as required.

The contractor **shall not** be responsible **or** tasked with the following as previously stated in the contract in section C, paragraph IV Procedures for Shipment Preparation, starting on page 5 of the contract:

Prepare and mail out the FNS 261 or the address labels for each box;
Remove the stretch-wrap from the skids, or open the banded skids;
and,
Affix address labels to each of the boxes.

In accordance with FAR Clause 52.243-1, paragraph (c), you must assert your right to an adjustment under this clause within 30 days from the date of receipt of the written order.

(Exhibit R at 145-46.)

29. Through unilaterally issued contract modification 18, the Government alters the schedule, established in modification 17, for the shipments of boxes to be destroyed. The modification is signed and effective August 29, 2003. (Exhibit S.)

30. On August 29, 2003, the contractor submitted invoices to the Government for each line item in the contract for August. Of relevance here, the invoice for storage and the invoice for automated ordering are each at the monthly unit price in the contract. (FF 25; Exhibit X at 163-64). Under the description, "food stamps delivered for the month of August 2003," an invoice seeks payment of \$59,039.60, for 2,866 boxes at \$20.60 each (Exhibit X at 165). The invoice does not specify the destinations of any of the invoiced boxes. However, this number of boxes reflects 1,066 boxes distributed to California (a state shipping point) and 1,800 boxes shipped to Atlanta for destruction (as described in modification 17) (not a state shipping point). (Exhibits U at 152, Y at 167.)

31. At the end of August 2003, the contractor had in storage 71,918 boxes (Exhibit KK at 5).

32. By letter dated September 4, 2003, to the Government, the contractor asserts its right to an equitable adjustment with respect to both performance and cost as a result of modification 17's change to the contract specifications. The submission seeks clarification, inquiring if the modification is intended to require a change to the contractor's computer system. The letter advises that, if the modification does not direct a change in the computer system, it does not materially reduce the contractor's cost of performance. (Exhibit T at 149-50.)

33. By letter dated September 9, 2003, to the Government, the contractor specifies, "To date, FNS has issued, in accordance with the terms and conditions of the Contract, the following requisitions and instructions for shipment for the distribution of food stamp coupons still maintained at" the contractor's facility. The letter identifies twenty-nine requisition and truck numbers, for shipments to be picked up between August 25 and September 22, 2003, inclusive, for Atlanta, totaling 60,471 boxes. This accounting identifies 4,500 (not 1,800) boxes as having been shipped to Atlanta during August, and the remainder with September dates for shipment. The contractor also "asserts its right to, and does not waive, the Contract price for each shipment made" as well as an equitable adjustment for alleged additional work incurred under modification 18. (Exhibit U.)

34. In a response to the two contractor letters of September, the contracting officer issued a letter dated September 11, 2003. The letter concludes with the following substantive paragraphs:

I want to bring your attention to paragraph 43.203 of the FAR -- Change order accounting procedures, and paragraph 43.204(4). Only those costs incurred directly with this work will be allowable. Therefore, it is requested that ABN submit their proposal for the equitable adjustment for the work outlined in modification 17, including the changes of modification 18. It is also requested that all back up documentation be included with the claim to substantiate the amount of the claim. Failure to include the requested documentation may delay the review of the claim and also cause it to be rejected.

Regarding your claim for economical adjustment, the claim is hereby denied, based on the foregoing.

(Exhibit V at 156.)

35. In response, by letter dated September 24, 2003, the contractor informs the Government that because modification 17 did not increase the contractor's cost of performance, "ABN shall not submit a claim for an equitable adjustment resulting from an *increase* to ABN's costs of performance for Modification No. 17." The letter also specifies that, although the modification did not "considerably reduce" the contractor's performance costs, the Government "may be entitled to a downward equitable adjustment to the contract price in the amount of \$6,262.55." The contractor states: "Should FNS not agree with this calculation, please be advised that FNS, not ABN, bears the burden of proving any downward equitable adjustment to the Contract. *Nager Electric Company, Inc. v. United States*, 442 F.2d 936, 946 (Cl. Ct. May 1971)." The contractor asserts its right to the contract unit price less its proposed downward equitable adjustment said to reflect its cost savings. Regarding costs incurred because of modification 18, the contractor states that it incurred additional costs totaling \$118.44. "However, as ABN deems this amount to be *de minimus*, ABN has elected not to file a claim for an equitable adjustment with respect to the increased costs ABN incurred as a result" of modification 18. (Exhibit W at 157-58.) In its calculations relating to the \$118.84, the contractor states that it shipped 65,195 boxes, specifically 4,515 to the Bureau of Printing and Engraving, and 60,680 destined for destruction (Exhibit W at 159 f.n. 3). This total of boxes shipped for destruction differs from the 60,471 boxes stated in its letter of September 9 (FF 33).

36. During September, the contractor distributed and shipped the remainder of the boxes in storage: 8,732 boxes distributed to California (to a state shipping point), 58,671 boxes shipped to Atlanta (not a state shipping point) for destruction, as described in modifications 17 and 18, and 4,515 boxes shipped to the Bureau of Printing and Engraving (not a state shipping point), as described in modification 17 (Exhibits T at 152-53, Y at 167, 170-71, AA at 178). These three figures total 71,918 boxes.

37. The contractor submitted to the Government an invoice with the date of September 30, 2003, for "food stamps delivered for the month of September 2003." The invoice seeks payment of \$1,481,510.80 (for 71,918 boxes at \$20.60 each). The invoice does not itemize or allocate the total number of boxes by ultimate destination. (Exhibit Y at 168.)

38. By letter dated October 6, 2003, the contractor (through its then-attorney) demanded payment from the Government for the August invoices. The letter states:

It is our understanding that ABN recently contacted FNS's accounts payable personnel with respect to the status of the payments for the above referenced invoices and that, during this conversation, ABN was informed that FNS would not make these payments until ABN executed Modification Nos. 016, 017, and 018 of the contract. We are unaware of any term in [the contract] that requires execution of modifications issued by FNS as a precondition for payment under the contract.

(Exhibit X.)

39. After having received invoices for services rendered in September, the contracting officer informed the contractor, by letter dated November 28, 2003:

I am returning the two referenced invoices to you without any action. These invoices are not correct. According to our records, your invoice #708240 [for the distribution line item for August] should be for \$21,959.60 (1066 boxes x \$20.60), and invoice #709280 [for the distribution line item for September] should be for \$179,879.20 (8,732 boxes x \$20.60). Once this office receives corrected invoices, they will be processed in accordance with the terms and conditions of your contract. If you have any information that is in conflict with the Government's records, it is requested that you send a copy to my attention to the address on this letter. Also, please remember that the Government cannot pay for invoices that are more than the obligated amount of funds on a contract.

(Exhibit Y at 167.)

40. In response to the letter of November 28, with a letter dated December 11, 2003, the contractor submitted a certification of its claim for \$1,534,287.85. This figure expressly represents payments for earlier submitted (yet fully unpaid) invoices said to be under the distribution line item for August of \$59,039.60 (2,866 boxes x \$20.60 per box) and for September of \$1,481,510.80 (71,918 boxes x \$20.60 per box) less \$6,262.55 (which the contractor claims to be its savings given the reduced work required by contract modification 17). The certified claim does not specify the number of boxes shipped to California, to the Bureau of Printing and Engraving, or to Atlanta, and does not confirm or reject the numbers proposed by the Government in the letter of November 28. The contracting officer received the claim on December 16, 2003. (Exhibit Z at 172-76.)

41. The contracting officer issued a decision dated December 22, 2003, granting the claim, in part. The decision states the Government's position as recognizing an outstanding balance due the contractor. The decision grants the claim in specific amounts: \$21,959.60 (for distributing 1,066 boxes at \$20.60 per box) for August and \$179,879.20 (for distributing 8,732 boxes at \$20.60 per box) for September, and \$1,647.87 ("as settlement for placing the skids in the armored carriers for transport to Atlanta as required by Modifications 17 and 18"). Although acknowledging a Government indebtedness under the contract, the contracting officer did not provide payment. (Exhibit AA.)

42. On March 19, 2004, the contractor filed this appeal with the Board. With the notice of appeal is the complaint, raising two counts. In count I, the contractor claims entitlement to payment of its invoices at the contract unit price less the value of an alleged de minimus deductive change (which the contractor prices at \$6,262.55). It seeks a total recovery of \$1,534,287.85, plus interest permitted by the Contract Disputes Act. In count II, the contractor claims that it is entitled to payment for amounts the Government admits that it owes, specifically \$201,838.80 for the delivery of 9,798 boxes to California.

Additional information

43. In summary, the Board finds that in August and September 2003, the contractor distributed to California, a state shipping point, 1,066 and 8,732 boxes, respectively; this total is 9,798 boxes. In August and September 2003, the contractor shipped to Atlanta (for destruction, not a state shipping point) 1,800 and 58,671 boxes, respectively; this total is 60,471 boxes. In August and September 2003, the contractor shipped to the Bureau of Printing and Engraving (not a state shipping point) 0 and 4,515 boxes, respectively. During contract year 5, the contractor distributed 46,548 boxes to state shipping points and shipped 64,986 boxes to other than state shipping points. This total is 111,534 boxes. The contractor disposed of all boxes in storage. (Exhibits AA at 178, KK 4-5.) During the entire contract, the contractor distributed a total of 492,717 boxes to state shipping points, compared to the total of 450,000 boxes, which represents the sum of the maximums identified in the distribution line items of the contract as awarded and utilized by the contractor in pricing its services (FF 20, 21).

44. During a telephone conference involving the presiding judge and the parties, the Government noted that it had paid the contractor for the boxes distributed to California. The contractor indicated that it had received notification of a wire transfer. The amount of the payment was not specified. (Memorandum of Telephone Conference Held on April 22, 2004). Although the parties agreed to discuss the payment, the existing evidentiary record does not indicate the amount of the payment or the date it was received. However, the contractor states in its brief that it received payment of \$201,838.80 on April 23, 2004; this amount is for the distribution of 9,798 boxes distributed to California at \$20.60 per box (Contractor Brief at 6 (¶¶ 9, 10)). The contractor seeks interest on this amount from December 11, 2003, until April 23, 2004 (Contractor Brief at 6-7 (¶ 10)). (The contractor offers no explanation for the April 23 date, given the contractor's indications during the telephone conference with the Board on April 22 that it had been paid.) In addition, the contractor claims entitlement to the contract price for work performed under the contract with a deductive change for specific tasks deleted, or \$1,332,449.05, plus applicable interest (Contractor Brief at 31). That is, the contractor seeks payment for boxes shipped during August and September to other than California, at \$20.60 per box, less \$6,262.55 (representing its savings), plus applicable interest.

45. The contractor has not provided specific factual support or discussion of the costs incurred to store or distribute the boxes that were shipped to Atlanta or the Bureau of Printing and Engraving (each not a state shipping point) or for the boxes in excess of the maximum in the contract, either initially or as modified. The record does not demonstrate that the contractor incurred any specific cost that had not been anticipated or compensated. That is, the contractor amortized and allocated various of its costs over each year of the contract or within any given year. There is no indication that additional personnel were required to perform any of the tasks at issue, or that the contractor incurred additional hourly or per item costs to provide the services. For example, in the pre-award process the contractor identified various anticipated costs it would incur, which it used in justifying its pricing. The identified costs are for guards (wages, overtime premium, and payroll charges), utilities, facility lease costs, insurance, plant supplies and maintenance, security alarm, guard expense, and leases, salaries of various individuals, data communication and equipment, maintenance costs, and year 2000 compliance and system upgrade costs, and miscellaneous supplies. In the existing record, such prices are not confirmed as having been incurred. Moreover, there is no proof that the contractor incurred an increase to any of these identified expenses, or incurred any

additional expense, to store or ship the boxes in question. The record does not demonstrate the reasonableness of the \$20.60 unit price for the distribution of any box in excess of the maximum figures negotiated. For example, the contractor already had fully recovered many (if not all) of its identified costs (such as leases, security alarm, salaries, and computer system compliance and upgrades) such that those costs no longer should be part of the calculation. Rather, the record supports the conclusion that the contractor incurred, at best, minimal expenses to store and distribute boxes in excess of the negotiated maximum figure; the record does not support the conclusion that the contractor has been uncompensated for any cost or expense to store, ship, or distribute any of the boxes in question. (Exhibits GG, HH.)

46. The contractor had stored and distributed food coupon boxes under earlier contracts for several years (Exhibit CC at 1 (¶¶ 2, 3)). Although the record does not contain the earlier contracts, those contracts had been priced with a fixed unit price per box for each year (Exhibit BB at 2 (¶ 5)). In an affidavit, the Government's procurement contracting officer for this contract avers: "At no time during the prior course of dealing with ABN under similar Food Stamp Distribution contracts has ABN been paid the firm fixed price per box for 'distribution' for those food stamp coupons remaining in the storage facility at the end of a contract period of performance." (Exhibit CC at 1 (¶ 4).) Through an affidavit, the Chief Operating Officer of the contractor responds, taking issue with the statement:

In fact, ABN was paid the fixed unit price for distribution of those very remaining Food Coupon Boxes, but under the successor contract. Each booklet of Food Coupons is an accountable item and FNS gave no disposition instructions for any remaining Food Coupon boxes, but simply rolled the inventory over into performance of the next contract.

(Exhibit LL at 1 (¶ 2).) This affidavit fully supports the assertion of the contracting officer. For boxes remaining in storage at the end of a prior contract, the contractor did not obtain compensation for the distribution of boxes under the contract during which storage began. Rather, compensation for distribution was made under a successor contract.

47. The contracting officer explored the use of an outside contractor to shred the excess coupon books at the storage facility, but met resistance from this contractor. This contractor refused to allow another contractor to come onto its premises. (Exhibit CC at 2-3 (¶¶ 8, 12-14, 18).) This Board need not here determine the applicability of an express contract provision, which seemingly would have required the contractor to grant access to a different Government contractor: "The Contractor shall grant unescorted and unannounced access to the plant for all Government officials and representatives bearing credentials specified by the CO [contracting officer]." (Exhibit A at 17 (¶ C-1.I.R.7).)

DISCUSSION

For each box in storage and ultimately shipped during August and September 2003, the contractor maintains that it is entitled to relief at the contract unit price for distribution less savings resulting

from the Government's unilaterally issued deductive changes. The Government contends that the contract modifications added work (and were not deductive change orders), such that the contractor bears the burden of demonstrating its reasonable costs to perform the additional work.

The contractor premises its claim for relief on incorrect assumptions. After detailing the results dictated by the contract and facts, the Board addresses some of the various contentions raised by the parties.

Analysis

Underlying this dispute is a requirements contract with stated maximums for distribution. In the contract, the Government specifies its requirements as involving the storage and distribution to state shipping points of boxes. The contract identifies the maximum number of boxes to be distributed during any contract year at the given unit price; this maximum is emphasized by the pricing and payment provisions which are capped on a line item basis based upon the maximum. (FF 1-3, 6, 8, 23, 25.) The unit price is not applicable to the distribution of boxes in excess of the maximum; the contract does not contain an agreed upon unit price for the boxes in excess of the maximum. Additionally, the shipment of boxes to other than the state shipping points falls outside of the stated requirements.⁷

As originally signed, in the distribution line item for contract year 5, the contract provided for the distribution of a maximum of 21,000 boxes at the unit price of \$20.60 per box (FF 6, 21). In April 2003, by bilateral contract modification, the parties agreed to increase the maximum number of boxes in this distribution line item by 15,000 (to 36,000) boxes at the same unit price (FF 25).

During contract year 5, by the end of July 2003, the contractor had cumulatively distributed 36,750 boxes to state shipping points and had in storage 74,784 boxes (FF 26). Because the number of boxes already distributed during the contract year exceeded the maximum under the distribution line item, the boxes in storage did not fall within the requirements and unit pricing of the contract. It is incorrect to view the distribution line item price as applicable to any requirement above the

⁷ This case does not require the Board to decide if this requirements contract obligates the Government to utilize the contractor for distribution to a state shipping point not identified in the contract.

contract's maximum quantity in each year; such an interpretation (as proffered by the contractor) makes superfluous the maximum quantities and the specific limitations by dollar value for each line item found in the contract. During August 2003, the Government proposed a bilateral contract modification that would have increased to 51,900 boxes the maximum number of boxes to be distributed during the contract year at the unit price of \$20.60, while retaining other line item pricing. The contractor refused to sign the modification. (FF 27, 38.)

The Government had a legitimate need to dispose of all boxes remaining in storage during the final two months of the contract. The distribution and shipments of the remaining boxes fall within the general scope of the contract; however, the efforts are in addition to those priced within the contract. Therefore, modifications 17 and 18 are change orders adding work to the contract; the modifications are not deductive change orders. As discussed below, with references to Nager, the contractor bears the burden of proof to recover its costs and profit for performing the added work.

Count II

During August and September 2003, the contractor distributed 9,798 boxes to California, a state shipping point. With these shipments, the contractor distributed a total of 46,548 boxes to state shipping points during contract year 5. (FF 43.) Because the contractor did not sign the proposed bilateral modification, the contract lacked an established price for the distribution of these boxes (FF 27, 38). In the decision underlying this dispute, the contracting officer acknowledged a Government obligation to pay the contractor \$201,838.80 for the delivery of these boxes shipped in the final two months of the contract; that is, calculated as $9,798 \times \$20.60$ (FF 41). The contractor states that it has received payment of this amount (FF 44). Although the existing record does not demonstrate that the \$20.60 unit price is a reasonable price for the distribution of these boxes, which are in excess of the maximum identified in the contract (initially and as amended) for distribution during contract year 5 (FF 45), the Government apparently has paid the contractor this amount that it sought and that the contracting officer found due. The Government does not here seek to recover any of this amount.

This count of the complaint is moot. However, by operation of statute (the CDA), 41 U.S.C. § 611 ("Interest on amounts found due contractors on claims shall be paid from the date the contracting officer receives the claim . . . until payment thereof"), the contractor is entitled to recover interest calculated from December 16, 2003 (FF 40), until the date of payment (a date not established in the evidentiary record) on the amount found due by the contracting officer. The record does not establish if the Government has paid the contractor for the interest calculated pursuant to statute.

Count I

In this count, the contractor seeks payment for all boxes distributed or shipped during August and September 2003. For those distributed to California, the resolution is set forth above. During August and September 2003, the contractor shipped 64,986 boxes to locations other than state shipping points (FF 43). These shipments fall outside of the specific requirements in the contract in two respects-- they are for boxes in excess of the distribution line item maximum and they are to locations other than those identified (that is, not state shipping points). Therefore, the contract

contains no agreed upon unit pricing for these boxes. The contractor bears the burden of proof to recover for its efforts for this work added by contract modifications 17 and 18. In so singularly pursuing its deductive change order theory of relief (entitlement to the \$20.60 unit price for all boxes shipped under the two contract modifications), the contractor has not presented evidence of specific costs incurred to perform the work required by the additive change order modifications; the contracting officer had initially sought such information in attempting to price the change orders. The record fails to demonstrate that the contractor has incurred any uncompensated costs for its efforts involved in performing the work underlying this count (FF 45). Accordingly, the Board denies the claim for payment for these boxes.

Matters raised by the parties

The above analysis resolves the dispute and addresses some of the basic misconceptions of the contractor (namely, contrary to the contractor's view, the requirements contract and unit pricing do not apply to any box shipped in excess of the maximum or to other than a state shipping point, such that contract modifications 17 and 18 represent additive, not deductive, change orders). Other statements of the parties merit discussion. Of initial significance, following from the determination that the contract does not contain a price for the added services, is an explanation of why the burden is on the contractor to establish its reasonable costs incurred.

The contractor maintains that the burden of proof is on the Government. In referencing Nager, 442 F.2d at 946, in its correspondence with the Government (FF 35), the contractor appears to rely on the first sentence here quoted, found in a discussion of the compensation to be paid after a change order substituted a less expensive type and smaller number of valves for those originally required under the contract specifications:

Another principle which is integrally involved in this case is that the Government has the burden of proving how much of a downward equitable adjustment in price should be made on account of the deletion of the original [work]. Just as the contractor has that task when an upward adjustment is sought under the Changes clause, so the defendant has the laboring oar, and bears the risk of failure of proof, when a decrease is at issue.

The present case does not involve the deletion of original work. Nor does the change involve the deletion of work that fell under the requirements identified in the contract--the additional boxes distributed to California exceeded the maximums used in establishing the pricing, while the other boxes at issue were not delivered to state shipping points and exceeded the maximums used in establishing the pricing. The Government utilized the contract to satisfy all of its identified requirements under the contract for the entire five years of the contract. The distribution of the boxes at issue fall outside of the distribution line item pricing in the requirements contract and represent additional work, not deleted or decreased work. Moreover, the contractor intentionally did not sign a proposed bilateral modification that would have increased the number of boxes for potential distribution under the contract and would have established pricing for the boxes distributed to California during the final two months of the contract. The court's final quoted sentence above is

here applicable. An additive change occurred with modifications 17 and 18. This contractor bears the burden of proof to recover; it has failed to satisfy that burden.

The court provides additional, relevant instruction:

The consideration of the particular contractor's actual and probable costs is tied to the overall function meant to be served by equitable adjustments to contractors for Government-induced contract modifications:

Equitable adjustments in this contract are simply corrective measures utilized to keep a contractor whole when the Government modifies a contract. Since the purpose underlying such adjustments is to safeguard the contractor against increased costs engendered by the modification, it appears patent that the measure of damages cannot be the value received by the Government, but must be more closely related to and contingent upon the altered position in which the contractor finds himself by reason of the modification.

Nager, 442 F.2d at 946. The record does not contain factual evidence or even an explanation by the contractor that supports the conclusion that it remains uncompensated for any costs incurred because of the contract modifications. The contractor states that it has been reimbursed at the unit price for all boxes shipped to California in accordance with the terms and conditions of the contract (FF 44). This means that the contractor has been paid for distributing 46,548 boxes to state shipping points in contract year 5, although contract pricing was calculated based upon a maximum distribution of 21,000 boxes during that year (FF 21, 43). Over the life of the contract, the contractor received payment at the unit prices for distribution, for the distribution of 492,717 boxes, although the contract pricing was calculated based upon a maximum distribution of 450,000 boxes (FF 43). Given the general pricing of the line items, the contractor has been reimbursed under the contract for all of its fixed and variable costs allocated over the life of the contract and during the final contract year.

At issue here, is the contractor's reimbursement for its costs incurred in performing the work required and performed under the additive change orders. Although the contractor may have incurred costs, for example, on an hourly basis for employees to handle the additional boxes, the record provides insufficient support regarding hours consumed and hourly wages and burdens. The record suggests, and most convincingly demonstrates in the absence of proof to the contrary, that the contractor has been more than equitably compensated for its services required by the additive change orders, because the Government has paid the contractor at the \$20.60 unit price for the additional boxes shipped to California under contract modification 17. Without support in the record, the contractor recovers no additional compensation.

The contractor opines that the contracting officer could have, but did not, utilize the termination for convenience clause, use a different contractor to destroy the excess coupons at this contractor's facilities, invoke the cancellation clause, or invoke the changes clause to create new line items (Contractor's Brief at 23-24). First, there was no need to issue a termination for convenience,

because the Government utilized the contractor to satisfy all of the requirements identified in the contract (there was nothing to terminate at the time the Government issued contract modification 17); a termination for convenience would not have removed the boxes from storage or necessarily diminished the additional work to be compensated based upon reasonably incurred costs (FF 14). Second, by prohibiting another contractor from entering its site to perform destruction services, the contractor frustrated the initial plan for the Government to dispose of 60,471 boxes; however, the Government is not seeking to recover money because the contractor hindered the Government's efforts to mitigate costs (FF 47). Third, the Government correctly refrained from invoking the cancellation clause, because the Government never cancelled its requirements. Further, cancellation during contract year 5 would have required the contractor's agreement, would not have cleared the boxes from storage, and would have permitted the same recovery as here available, because the contractor would have to demonstrate its unrecovered amortized and allocated costs (of which there were none) and its costs to perform the work relating to the additional boxes. The figure in the cancellation clause is a cap on the contractor's recovery, not a lump sum the contractor automatically recovers. (FF 10, 11.) Lastly, as to the final notion, the Government did invoke the changes clause to create new line items (although not specifically identified as line item numbers); it was for this work that the contractor was obligated to demonstrate its reasonably incurred, recoverable costs to obtain an equitable adjustment different from that offered by the Government (FF 14).

For purposes of payment, the contractor equates storage and distribution under the contract, as it claims it became entitled to compensation for storage and distribution at the moment it received a box into storage at its facility. In support, the contractor references contractual requirements and obligations it incurred after receiving a box into storage (for example, it had to secure and keep track of each box and remained liable for any damage or theft). This attempt to equate storage and distribution for payment purposes cannot be reconciled with the language of the contract and the alternate proposal drafted and submitted by the contractor, or the responses provided by the contractor to specific inquiries by the Government during the negotiation process, or the actions of the parties.

As awarded, the contract has distinct, separately priced line items for storage and for distribution (FF 6, 15, 17, 21). Contract modifications retain the distinctions (FF 19, 23, 25). On its face, the contract treats storage and distribution as discrete activities for payment purposes. The contract identifies a specific activity that triggers distribution, namely a Government order for the shipment of a box (FF 2, 5). Absent an order for delivery, any box would remain in storage. Distribution does not automatically occur for any box in storage.

The contract does not guarantee that every stored box will be distributed to a state shipping point. Rather, the contract specifies that the Government is phasing out its requirements (FF 1); this makes it a real possibility that boxes in storage may not be distributed. The distribution line item unit price is not the figure to be utilized for payment under the cancellation clause (FF 10, 11), or the termination for convenience and the changes clauses (FF 14), for boxes remaining in storage. Under these clauses, the contractor would recover expended, but otherwise unrecovered, costs to dispose of such boxes; recovery is not tied to the unit price.

The contract also contains specific limitations on payments (FF 2-4) and the explicit “not to exceed the total amount for any item” in the payment provision (FF 8), as well as the Non-Payment for Additional Work clause (FF 9). The contractor signed bilateral contract modifications that expressly recognize the limitations, even when the contractor had more boxes in storage than it could distribute under the existing contract (FF 19, 22, 23, 25). Given the explicit limitations, a reasonable contractor could not expect to be reimbursed for the distribution line item in an amount greater than the identified total of the contract, as amended. To conclude otherwise would give no meaning to the express clauses.

Probing beyond the contract clauses that do not obligate the Government to pay a distribution charge for every box in storage, the alternate proposal, drafted and submitted by the contractor, does not specify that the Government will incur a distribution charge for every box that is received into storage. (FF 7). On its face, the alternate proposal identifies storage and distribution as separate line items, with no indication that storage triggers a distribution charge. Even looking beyond the contract and alternate proposal, the contractor emphasized during negotiations that storage and distribution are “distinct parts of the contract” that form a basis for the alternate proposal (FF 7). To now equate the distinct activities for payment purposes is both inconsistent with this prior interpretation and is unreasonable given the separate line items of the contract.

Finally, the actions of the parties support the interpretation of the Government, not that of the contractor. Specifically, the contractor did not invoice for distribution charges at the time it received a box into storage. Rather, invoicing occurred after the Government had ordered the shipping and distribution had taken place. Also, the contractor did not invoice at the unit price applicable on the date a box was received into storage; that is, for boxes shipped during contract year 5, the contractor invoiced at \$20.60, not \$11.47, per box. Additionally, as noted above, the parties signed bilateral contract modifications, each with an explicit limitation on the payment available under the modified contract for the distribution line item price. These acknowledged limitations negate a contractor expectation to receive payment in excess thereof.

The explanations of the Chief Operating Officer of the contractor, regarding how he priced the alternate proposal to be competitive and his assumptions and legal interpretations (Exhibits BB, LL) are not germane to the interpretation of the contract. The alleged presumptions and assumptions are not reduced to writing and are not included in the contract. The obligations and risks allocated under the contract are not altered by what are, based upon the record, no more than previously unstated business decisions that were not conveyed to the Government as forming a basis of the agreement.

The contractor highlights that each month of the contract the Government was aware of the number of boxes in storage. Such is not in dispute. Just as true, the contractor was aware of the number of boxes in storage and the limitations by contract year on payment under the distribution line item. This knowledge of each party does not alter the interpretation of the contract. The Government shifted various risks to the contractor through the requirements contract with line item limitations on payment. The contractor made business decisions to price its alternate proposal as it did and to accept into storage a number of boxes in excess of the total boxes to be distributed under the

contract. Such determinations by the contractor do not obligate the Government to reimburse the contractor for more than reasonable, proven costs for added services.

The contractor correctly notes that the contract does not contain a clause or line item covering the destruction of boxes. However, the contract does not need to include a specific clause or line item, because shipments to other than states for use in the program fall outside of the requirements of the contract. The changes clause permits the Government to direct such work; under that clause reimbursement is on an equitable basis (FF 14).

The parties reference prior contracts (FF 46). The record demonstrates that even with a line item defined to encompass both storage and distribution on a per box basis, the contractor was aware that not all boxes held in storage were distributed during the term of those contracts and that it did not get paid under those contracts for boxes not distributed during their term. The prior practices of the parties, particularly with the unified line item in the earlier contracts, undermines the contractor's reading of this contract.

The Government contends that the Government Property (DEC 1989) clause, 48 CFR 52.245-2, should be read into the contract, although the solicitation and contract do not reference the clause. The Government maintains the clause is mandatory under regulation, 48 CFR 45.106(b)(1), that specifies that the "contracting officer shall insert the clause at 52.245-2, Government Property (Fixed-Price Contracts), in solicitations and contracts when a fixed-price contract is contemplated." In urging the application of the Christian doctrine, the Government notes that the Armed Services Board of Contract Appeals has read the clause into a contract, Rehabilitation Services, ASBCA No. 47085, 96-2 BCA ¶ 28,324. (Government Brief at 4-6.) Particularly in light of the commendable dissent found in that opinion, the Government has not demonstrated that the clause expresses a significant or deeply ingrained strand of public procurement policy so as to be deemed a part of the contract by operation of law. The Government has demonstrated neither that it is appropriate nor necessary to augment the contract.

Employing an additional approach to recovery, the contractor states that "FNS agreed to the Contract's \$20.60 unit price per box for the Distribution subCLIN in Year 5, presumably understanding the scope of work ABN proposed to include in that price" (emphasis added). It then suggests that the Government's actions--in determining the contractor's cost and profit to ship boxes to Atlanta and in characterizing the shipments as not being covered by the contract--lack a rational basis and are unconscionable. (Contractor Brief at 26-27.) The contractor attempts to rely upon a presumption that is not supported by the language of the contract or by the actions of either party at the time of contracting. Unstated presumptions are unpersuasive and merit no weight. The contractor's characterizations of the Government's actions as lacking a rational basis and being unconscionable are no more than characterizations. Of relevance here, the contractor has had the opportunity to develop the record in this proceeding to demonstrate both its entitlement to and the quantum of recovery for services performed. The contractor has not met its burden of proof.

DECISION

The Board denies this appeal.

JOSEPH A. VERGILIO
Administrative Judge

Concurring:

HOWARD A. POLLACK
Administrative Judge

ANNE W. WESTBROOK
Administrative Judge

Issued at Washington, D.C.
February 1, 2005